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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF ARIZONA**

9 United States of America,

CR 19-1094-TUC-JGZ (JR)

10 Plaintiff,

GOVERNMENT'S RESPONSE TO
DEFENDANT'S OBJECTIONS TO
PRESENTENCE REPORT

11 vs.

12 Isaias Delgado,

13 Defendant.

14 Plaintiff, United States of America, by and through its attorneys undersigned,
hereby submits its Response to the Objections to the Presentence Report filed by Defendant
Isaias Delgado ("the defendant") in the above-referenced case. (Doc. 166.) Sentencing is
currently set for February 22, 2022.

15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I. FACTS, PROCEDURAL HISTORY, AND GUIDELINE CALCULATIONS**

17 The government herein encompasses the facts, procedural history, and sentencing
guideline calculations contained within the government's Objections to the Draft
Presentence Report. (Doc. 167.) The government submits that the defendant's total
offense level is 28 and Criminal history Category is I, for an advisory sentencing guideline
range of 78 to 97 months imprisonment and a statutory maximum sentence of 5 years (60
months) imprisonment.

1 **II. DEFENDANT'S OBJECTIONS**

2 The defendant objects to the Probation Department's inclusion in the Draft
 3 Presentence Report of information concerning other criminal activity by the defendant, its
 4 calculation of the number of firearms involved in the defendant's offense of conviction,
 5 and the references to the defendant's use of a false address when purchasing firearms from
 6 licensed firearms dealers. The government respectfully requests that this Court overrule
 7 the defendant's objections.

8 **a. Other Criminal Activity**

9 The defendant objects to the references in paragraphs 5 and 6 of the Draft
 10 Presentence Report to the defendant's suspected financial crimes between 2009 and 2018
 11 and his border crossing activity between 2009 and 2021.¹ The government submits that it
 12 is entirely appropriate for the Court to consider information regarding the defendant's
 13 history and background, including other suspected criminal offenses. *See Williams v. New*
14 York, 227 U.S. 241, 244-46 (1949) (rejecting application of strict evidentiary rules at
 15 sentencing). Rule 32 of the Federal Rules of Criminal Procedure reflects the courts' wide
 16 latitude to consider any information about a defendant that may be helpful in imposing
 17 sentence, and the presentence report should include such information. Fed.R.Crim.P.
 18 32(d); *Williams*, 277 U.S. at 246.

19 As the Court is well aware, presentence reports in this District routinely include a
 20 section for "Other Criminal Conduct," which addresses unlawful conduct that a defendant
 21

22 ¹ The government submits that the minor difference of four working days between
 23 providing the information to which the defendant objects to the Probation Department and
 24 to the defendant was attributable to the fact that counsel for the defendant does not use the
 25 government's electronic disclosure system (USAfx). In fact, to provide the defendant with
 26 this information as quickly as possible, the government emailed the disclosure to defense
 27 counsel rather than using regular mail or requiring defense counsel to obtain physical
 28 copies at government counsel's office. However, the use of email still resulted in a brief
 delay because it was necessary to encrypt the documents prior to emailing them to defense
 counsel. The government further submits that the content of the documents provided to the
 Probation Department and the defendant is the same; the format differed slightly in that the
 documents emailed to defense counsel were converted to PDF format for redaction and
 encryption purposes.

1 may have been suspected or accused of but that has not resulted in arrest or conviction.
2 The defendant provides no basis for which he should be treated differently than every other
3 convicted offender sentenced in this District, wherein courts properly consider a wide
4 range of information relevant to its formulation of the appropriate sentence, including
5 uncharged criminal conduct. “The knowledge of the life of a man, his background and
6 family, is the only proper basis for the determination of his treatment. There is no
7 substitute for information.” *Williams*, 277 U.S. at 449, n. 14. (quoting Schwellenbach,
8 Information vs. Intuition in the Imposition of Sentence, 27 J.Am.Jud.Soc. 52 (1943)). “To
9 deprive sentencing judges of this kind of information would undermine [the goals of
10 sentencing].” *Id.* at 249-50.

11 The defendant’s argument that this Court should not consider evidence that the
12 defendant was involved in firearms trafficking because such evidence was not permitted at
13 trial fails for a number of reasons. First, the government agreed prior to trial that it would
14 not seek to introduce evidence of firearms being trafficked to Mexico, as such evidence
15 was not necessary to the elements of the defendant’s offense of conviction. (Doc. 111.)
16 However, the Court is not restricted at sentencing to the evidence introduced at trial; to the
17 contrary, as discussed, it considers a wide range of information related to the offense and
18 the defendant’s history and characteristics. *See* Fed.R.Crim.P. 32(d). Second, the
19 sentencing guideline for the defendant’s offense of conviction expressly requires
20 consideration of evidence of firearms trafficking and transportation of firearms outside the
21 United States because such conduct warrants sentencing enhancements for dealing firearms
22 without a license. U.S.S.G. § 2K2.1(b)(5), (6).

23

b. Number of Firearms

24 The defendant next objects to the four-level enhancement for number of firearms
25 assessed in paragraph 22 of the Draft Presentence Report. In response, the government
26 herein incorporates its arguments regarding the appropriate enhancement for number of
27 firearms as set forth in its Objections to the Draft Presentence Report. In summary, this
28

Court has found that the government established by a preponderance of the evidence that the defendant's offense involved the 25 firearms listed in the Court's Order of Forfeiture. (Doc. 147.) Based on this Court's finding following the forfeiture hearing, the government submits that the six-level enhancement pursuant to §2K2.1(b)(1)(C) is appropriate.

The defendant argues that he should only receive a two-level enhancement for number of firearms because he only admitted to selling three firearms. The defendant's argument fails for several reasons. First, the Court is not bound by admissions of a defendant when determining the appropriate sentencing guideline calculations. Second, the jury's verdict reflects that it rejected the self-serving statements by the defendant and found them not to be credible. Third, the government introduced ample evidence at trial which proved to the jury beyond a reasonable doubt that the defendant was engaged in the repeated purchase and sale of firearms *beyond* occasional sales, as required by his statute of conviction.

Fourth, the Court's Order of Forfeiture – based on a preponderance of the evidence and not “speculation” – reflects that it also rejected the defendant's claim that he only sold three firearms. Fifth, the defendant's offense of conviction does not require any actual firearm sales. *See Model Crim. Jury Instr.* 9th Cir. 8.53 (2021). Therefore, his claim of only having sold three firearms is of no moment; calculation of the number of firearms involved in his offense is not limited to the firearms he actually sold but also any he purchased with the intention to sell. And sixth, the Court found that evidence of all 38 firearms listed in paragraph 16 of the Draft Presentence Report were relevant to the defendant's offense of dealing firearms without a license and admissible at trial. The government submits that the defendant's offense of conviction involves 38 firearms (and at the very least 25 firearms), and the defendant's objection that he should only receive a two-level enhancement should be overruled.

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1 **c. False Address**

2 The defendant finally objects to the reference in paragraph 13 of the Draft
3 Presentence Report that his address was not known. In response, the government herein
4 incorporates the facts and arguments regarding the defendant's use of a false address
5 during the purchase of firearms as set forth in its Objections to the Draft Presentence
6 Report. In summary, the investigation revealed that the defendant did not live at the
7 address he provided in Forms 4473 he completed to purchase a number of firearms, as
8 confirmed by statements during the investigation by his mother and sister, who did reside
9 at the address, and a neighbor of the defendant's mother and sister. The defendant was
10 indicted in this case on three counts of Making False Statements in Records of Federal
11 Firearms Licensees as a result of this conduct, and while the government dismissed these
12 three counts prior to trial, the Court may nonetheless consider such conduct at sentencing.
13 See *United States v. Watts*, 519 U.S. 148, 153-54 (1997); *United States v. Mercado*, 474
14 F.3d 654, 656-58 (9th Cir. 2007).

15 Furthermore, the government notes that the reference in paragraph 13 to which the
16 defendant objects involves to the agents' reasons to arrest the defendant during the
17 investigation. Whether the defendant was charged with or convicted of a criminal offense
18 of providing a false address in connection with his firearms purchases is thus of no
19 moment. The Draft Presentence Report accurately conveys that the agents were unsure of
20 the defendant's actual residence during the investigation (understandable in light of the fact
21 the three witnesses they interviewed at the residence the he used in the Forms 4473 stated
22 the defendant did not live there) and that fact – along with the facts that the defendant had
23 been in Mexico for several days, entered the United States that morning, and could not
24 account for the details of his firearm purchases or whereabouts of the firearms –
25 contributed to the agents' decision to arrest the defendant. The government submits that
26 paragraph 13 of the Draft Presentence Report is accurate and the defendant's objection
27 thereto should be overruled.

IV. CONCLUSION

For the reasons set forth above, the government respectfully requests that this Court overrule the defendant's Objections to the Presentence Report and adopt the guideline calculations as set forth in the government's Objections to the Presentence Report.

Respectfully submitted this 23rd day of December, 2021.

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United States Attorney
District of Arizona

s/ Angela W. Woolridge

**ANGELA W. WOOLRIDGE
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Copy of the foregoing served electronically or by other means this 23rd day of December, 2021, to:

Barbara Catrillo, Esq.
Attorney for Defendant Isaias Delgado